

Senate Bill No. 34

Passed the Senate March 11, 2010

Secretary of the Senate

Passed the Assembly March 11, 2010

Chief Clerk of the Assembly

This bill was received by the Governor this _____ day
of _____, 2010, at _____ o'clock ____M.

Private Secretary of the Governor

CHAPTER _____

An act to add Sections 2069, 2099, and 2099.5 to the Fish and Game Code, to amend Section 11430.70 of the Government Code, and to add Section 25524 to the Public Resources Code, relating to energy, making an appropriation therefor, and declaring the urgency thereof, to take effect immediately.

LEGISLATIVE COUNSEL'S DIGEST

SB 34, Padilla. Energy: solar thermal and photovoltaic powerplants: siting: California Endangered Species Act: mitigation measures.

(1) Existing law vests exclusive power to certify a thermal powerplant with the State Energy Resources Conservation and Development Commission (Energy Commission). Existing law requires a person to obtain a certification from the commission prior to commencing the construction of a thermal powerplant, as defined.

This bill would require the Energy Commission to establish a process for certain applicants for certification of a solar thermal powerplant that allows the applicant to elect to pay additional fees to be used by the Energy Commission to contract with 3rd parties to assist Energy Commission staff in performing the analysis otherwise performed by staff in determining whether or not to issue a certification. The Energy Commission would retain discretion as to when this option will be offered to qualified applicants.

(2) The California Endangered Species Act (CESA) requires the Fish and Game Commission to establish a list of endangered species and a list of threatened species and requires the Department of Fish and Game to recommend, and the commission to adopt, criteria for determining if a species is endangered or threatened. CESA states that state agencies should not approve projects, as defined, that would jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat essential to the continued existence of the species if there are reasonable and prudent alternatives available consistent with conserving the species or its

habitat that would prevent jeopardy. CESA further declares that in the event specific economic, social, or other conditions make infeasible these alternatives, individual projects may be approved if appropriate mitigation and enhancement measures are provided. CESA authorizes the department to authorize the take of threatened species, endangered species, or candidate species by permit if the take is incidental to an otherwise lawful activity, the impacts of the authorized take are minimized and fully mitigated, the permit is consistent with specified regulations, and the applicant ensures adequate funding to implement the minimization of mitigation measures and monitors compliance with, and effectiveness of, those measures.

This bill would authorize the department, in consultation with the Energy Commission and, to the extent practicable, the United States Fish and Wildlife Service and United States Bureau of Land Management, to design and implement actions to protect, restore, or enhance the habitat of plants and wildlife that can be used to fully mitigate the impacts of the take of endangered, threatened, or candidate species (mitigation actions) resulting from certain solar thermal and photovoltaic powerplants in the planning area of the Desert Renewable Energy Conservation Plan, as defined. The bill would establish the Renewable Energy Resources Development Fee Trust Fund as a continuously appropriated fund in the State Treasury to serve, and be managed, as an optional, voluntary method for developers or owners of eligible projects, as defined, to deposit fees sufficient to complete mitigation actions established by the department and thereby meet their requirements pursuant to CESA or the certification authority of the Energy Commission. The bill would loan \$10,000,000 from the Renewable Resources Trust Fund to the fund, to be repaid no later than December 31, 2012, to be used by the department to purchase mitigation lands or conservation easements and to cover related restoration, monitoring, and transaction costs incurred in advance of the receipt of fees and to cover the department's administrative costs for the program.

The bill would require the department to collect, and require the owner or developer of an eligible project to pay, a one-time permit application fee of \$75,000. The bill would require that fees collected by the department be deposited in the Fish and Game Preservation Fund. The bill would require the department to utilize

the permit application fee to pay for all or a portion of the department's cost of processing incidental take permit applications pursuant to CESA and would appropriate \$1,650,000 from the fund for those purposes. If the permit application fee is insufficient to complete permitting work due to the complexity of a project or timeline delays, the bill would authorize the department to collect an additional fee from the owner or developer to pay for its actual costs, not to exceed an additional \$75,000.

(3) Existing law, the Administrative Procedure Act, provides for the conduct of administrative adjudication proceedings of state agencies. Existing law generally prohibits during a pending proceeding, communication, regarding any issue in the proceeding, with the presiding officer from an employee or representative of the agency without notice and opportunity for all parties to participate, except as specified.

This bill would except from this general prohibition specified communications relating to determinations of applications for site certification that are before the Energy Commission and are made by employees of another state agency for the purpose of enabling the presiding officer to effectively manage the proceeding.

(4) Existing law generally requires the Department of Personnel Administration to establish and adjust salary ranges for each class of position in the state civil service subject to any constitutional merit limits. Existing law requires the salary range to be based on the principle that like salaries shall be paid for comparable duties and responsibilities. Existing law prohibits the department from making any adjustments that require expenditures in excess of existing appropriations that may be used for salary increase purposes.

This bill, until January 1, 2011, would approve the recruitment and retention differentials of the Department of Personnel Administration for specified employees in State Bargaining Units 1 and 10 employed by the Energy Commission covered by the October 29, 2009, letter from the Director of the Department of Personnel Administration to the Chairperson of the Joint Legislative Budget Committee.

The bill would specify that those differentials that require the expenditure of funds would not take effect unless funds for these provisions are specifically appropriated by the Legislature or already exist within available appropriations. The bill would

authorize either party to reopen negotiations on all or part of the addendum if the Legislature does not approve or fully fund any addendum included in this measure.

(5) The California Constitution authorizes the Governor to declare a fiscal emergency and to call the Legislature into special session for that purpose. The Governor issued a proclamation declaring a fiscal emergency, and calling a special session for this purpose, on January 8, 2010.

This bill would state that it addresses the fiscal emergency declared by the Governor by proclamation issued on January 8, 2010, pursuant to the California Constitution.

(6) This bill would declare that it is to take effect immediately as an urgency statute.

Appropriation: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 2069 is added to the Fish and Game Code, to read:

2069. (a) For purposes of this section, the following terms have the following meanings:

(1) “Desert Renewable Energy Conservation Plan” means the completed conservation plan in the Mojave and Colorado Desert regions adopted pursuant to the Natural Community Conservation Planning Act (Chapter 10 (commencing with Section 2800)), and covers the geographical area described in Section 4 of, and depicted in Exhibit A to, the “Draft Planning Agreement by and among California Department of Fish and Game, California Energy Commission, United States Bureau of Land Management, and United States Fish and Wildlife Service for the Desert Renewable Energy Conservation Plan,” document REAT-1000-2009-034, dated October 2009.

(2) “Energy Commission” means the State Energy Resources Conservation and Development Commission.

(b) The department, in consultation with the Energy Commission and, to the extent practicable, the United States Fish and Wildlife Service and the United States Bureau of Land Management, may design and implement actions, including the purchase of land and conservation easements, to protect, restore, or enhance the habitat of plants and wildlife that can be used to fully mitigate the impacts

of the take of endangered species, threatened species, or candidate species, for purposes of paragraph (2) of subdivision (b) of Section 2081 and Chapter 6 (commencing with Section 25500) of Division 15 of the Public Resources Code, resulting from solar thermal and photovoltaic powerplants in the Desert Renewable Energy Conservation Plan planning area that meet each of the following requirements:

(1) Either the Energy Commission determines that the application for certification was complete by February 1, 2010, or the local government in which the project is located has determined the project permit application is complete or has issued a notice of preparation of an environmental impact statement pursuant to Division 13 (commencing with Section 21000) of the Public Resources Code by February 1, 2010.

(2) The developer or owner of the proposed powerplant or generation facility has applied for, and would qualify for, funding under the federal American Recovery and Reinvestment Act of 2009 (Public Law 111-5). For purposes of this subparagraph, “funding” means a loan guarantee made pursuant to Section 406 of the act (42 U.S.C. Sec. 16516) or a grant for specified energy property in lieu of a tax credit provided pursuant to Section 1603 of Division B of the act, which division is titled the American Recovery and Reinvestment Tax Act of 2009.

(c) A mitigation action may only be used for the mitigation purposes described in subdivision (b) if it meets one of the following conditions:

(1) The department has implemented the mitigation action and determined that the action has resulted in the protection, restoration, or enhancement of the habitat of one or more species that are proposed to be covered by the Desert Renewable Energy Conservation Plan, and that are located in the planning area, and, based upon that determination, can be used, for purposes of paragraph (2) of subdivision (b) of Section 2081, to fully mitigate the impacts of the take of the species from one or more projects identified in subdivision (b).

(2) The mitigation action is included in an interim mitigation strategy for projects identified in subdivision (b). An interim mitigation strategy pursuant to this paragraph shall be developed by the department, in consultation with the Energy Commission and, to the extent practicable, the United States Fish and Wildlife

Service and the United States Bureau of Land Management, and shall include all of the following:

(A) A description of specific mitigation areas and specific actions on public or private land within the Desert Renewable Energy Conservation Plan planning area that are to be implemented, including a focus on habitat preservation, while also including enhancement or restoration actions that will do all of the following:

(i) Contribute to the conservation of each candidate species, threatened species, or endangered species for which a permit is issued.

(ii) Adopt a regional planning perspective that provides a foundation for, or that will complement, any conservation strategy to be developed for the Desert Renewable Energy Conservation Plan.

(iii) Implement mitigation actions within a reasonable period of time relative to the impact to the affected candidate species, threatened species, or endangered species, including, where feasible, advance mitigation. For purposes of this clause, “advance mitigation” means mitigation implemented before, and in anticipation of, future impacts to natural resources.

(iv) Include a description of the species that would be benefited by each mitigation action and how it would be benefited.

(B) A cost estimate for each action, whether on public or private land, using total cost accounting, including, as applicable, land acquisition costs, conservation easement costs, monitoring costs, transaction costs, restoration costs, the amount of a nonwasting endowment account for land management or easement stewardship costs by the department or other management entity, and administrative costs.

(d) The interim mitigation strategy shall be based on best available science and shall be reviewed by the Desert Renewable Energy Conservation Plan independent science advisors. The department shall seek and consider comments from the Desert Renewable Energy Conservation Plan independent science advisors in the design and location of each mitigation action implemented pursuant to this section. If the department elects to not incorporate comments of the independent science advisors into mitigation actions, the department shall explain the reasons for that decision in writing.

(e) The interim mitigation strategy shall be completed by the department no later than 60 days following the operative date of the act adding this section.

(f) (1) Nothing in this section shall modify the requirements of Section 2081, including the requirement to, where feasible, avoid and minimize impacts, the requirements of Division 13 (commencing with Section 21000) of, or the requirements of Chapter 6 (commencing with Section 25500) of Division 15 of, the Public Resources Code, or affect the existing authority of the department to authorize mitigation actions to comply with this chapter.

(2) With respect to the Energy Commission, in the case of an applicant seeking certification for a solar thermal power plant pursuant to Chapter 6 (commencing with Section 25500) of Division 15 of the Public Resources Code, or a lead agency, as defined in Section 21067 of the Public Resources Code, in the case of an applicant seeking approval of a photovoltaic powerplant, the sole effect of a mitigation action described in subdivision (c), and paid for through the deposit of fees as described in Section 2099, is to relieve an applicant of the obligation to directly take actions which are taken instead by the department or its contractor or designee pursuant to subdivision (b) to meet the applicant's obligations with respect to the powerplant's impacts to species and habitat. The mitigation action and deposit of fees shall not relieve the applicant of any other obligation, or the Energy Commission or the lead agency of any of its existing requirements of Division 13 (commencing with Section 21000) of, or the requirements of Chapter 6 (commencing with Section 25500) of Division 15 of, the Public Resources Code to analyze, avoid, minimize, or mitigate impacts to species and habitat, or make the findings required by those statutes.

(g) The mitigation actions implemented pursuant to this section shall be incorporated into the Desert Renewable Energy Conservation Plan upon the finalization of the plan, to the extent the mitigation actions are consistent with the plan's conservation strategy.

SEC. 2. Section 2099 is added to the Fish and Game Code, to read:

2099. (a) For purposes of this section, the following terms have the following meanings:

(1) “Eligible project” means a solar thermal powerplant or photovoltaic powerplant meeting the requirements of paragraphs (1) and (2) of subdivision (b) of Section 2069.

(2) “Energy Commission” means the State Energy Resources Conservation and Development Commission.

(b) (1) The Renewable Energy Resources Development Fee Trust Fund is hereby established in the State Treasury. The department shall collect a fee from the owner or developer of an eligible project that elects to use mitigation actions developed and approved by the department pursuant to Section 2069, and all moneys received for purposes of mitigation actions pursuant to Section 2069 shall be deposited in the fund and shall be held in trust and be expended solely for the purposes of, and in conformity with, that section, applicable permit or certification requirements for eligible projects, and any contractual agreement between the Energy Commission or department and the owner or developer of an eligible project. The department may contract with, or award grants to, third parties to implement mitigation actions in conformity with Section 2069 and this section.

(2) Upon direction by the department, the Controller shall create any accounts or subaccounts within the fund that the department determines are necessary or convenient to facilitate management of the fund.

(3) The fund shall serve, and be managed, as an optional, voluntary method for developers or owners of eligible projects to deposit fees to complete mitigation actions meeting the conditions of subdivision (c) of Section 2069 and for the purpose of meeting the requirements of this chapter or the requirements of Chapter 6 (commencing with Section 25500) of Division 15 of the Public Resources Code. Notwithstanding Section 13340 of the Government Code, the money in the fund is hereby continuously appropriated to the department, without regard to fiscal years, for the purposes enumerated in this section and Section 2069. An expenditure shall not be made from the fund except as authorized by the department.

(4) The sum of ten million dollars (\$10,000,000) is hereby transferred, as a loan, from the Renewable Resource Trust Fund to the fund. This loan shall be repaid from the fund to the Renewable Resource Trust Fund no later than December 31, 2012. The department shall use these funds, pursuant to paragraph (1)

of subdivision (c) of Section 2069, to purchase mitigation lands or conservation easements, and to cover related restoration, monitoring, and transaction costs incurred in advance of the receipt of fees pursuant to paragraph (5) and to cover the department's administrative costs for the program.

(5) A developer or owner of an eligible project that elects to use mitigation actions developed and authorized by the department pursuant to Section 2069 shall remit fees to the department for deposit into the fund for those mitigation actions in an amount that reflects the determination by the Energy Commission, with respect to a solar thermal powerplant, or the department, with respect to a solar photovoltaic powerplant, of the costs attributable to the mitigation actions that meet the standards of this chapter. The amount of fees to be paid by a developer or owner of an eligible project to meet the standards of this chapter shall be calculated on a per acre basis, using total cost accounting, and shall include, as applicable, land acquisition or conservation easement costs, monitoring costs, restoration costs, transaction costs, the amount of a nonwasting endowment account for land management or easement stewardship costs by the department or other management entity, and administrative costs and funds sufficient to repay any expenditure of state funds made pursuant to paragraph (4). To ensure the funds deposited pursuant to this section are sufficient to meet the standards of this chapter, the project developer or owner, in addition to payment of those funds, shall provide security, in a form and amount, not to exceed 5 percent of the amount of the funds, excluding any portion of the funds to be used for a nonwasting endowment, to be determined by the Energy Commission, with respect to a solar thermal powerplant, or to be determined by the department, with respect to a solar photovoltaic powerplant.

(c) The department shall monitor the implementation of the mitigation actions and the progress of the construction of the eligible projects. The department shall report all deposits, and the source of those deposits, on its Internet Web site. The department shall also report all expenditures from the fund on its Internet Web site and identify the mitigation activities or programs that each expenditure funded and its relationship to the permitted project. The Energy Commission, with respect to a solar thermal powerplant, and the department, with respect to a solar photovoltaic

powerplant, shall ensure that moneys paid pursuant to this section are used only for purposes of satisfying the standards of paragraph (2) of subdivision (b) of Section 2081. Where moneys are used to fund mitigation actions, including the acquisition of lands or conservation easements, or the restoration of lands, that use shall be in addition to, and not duplicative of, mitigation obtained through any other means.

(d) The department and the Energy Commission shall not allow any use of the interim mitigation strategy subsequent to a determination by the department that the time and extent of mitigation actions are not being implemented in rough proportion to the impacts of those projects. The department shall reinstitute the use of the interim mitigation strategy when the department determines the rough proportionality between mitigation actions and impacts of eligible projects has been reestablished by the completion of additional mitigation actions.

SEC. 3. Section 2099.5 is added to the Fish and Game Code, to read:

2099.5. (a) The department shall collect a permit application fee from the owner or developer of an eligible project, as defined in Section 2099, to support its permitting of eligible projects pursuant to this chapter. The owner or developer of a proposed eligible project shall pay a one-time permit application fee of seventy-five thousand dollars (\$75,000) to the department.

(b) The department shall collect the permit application fee, at the time the owner or developer submits its permit application or, for eligible projects for which an application has already been submitted, within 30 days of the operative date of this section. The department shall utilize the permit application fee to pay for all or a portion of the department's cost of processing incidental take permit applications pursuant to subdivision (b) of Section 2081 and Section 2080.1. If the permit application fee is insufficient to complete permitting work due to the complexity of a project or timeline delays, the department may collect an additional fee from the owner or developer to pay for its actual costs, not to exceed an additional seventy-five thousand dollars (\$75,000).

(c) For an eligible project seeking site certification, pursuant to Chapter 6 (commencing with Section 25500) of Division 1 of the Public Resources Code, by the Energy Commission, as defined in Section 2099, the owner or developer shall pay the permit

application fee directly to the department. The permit application fee paid to the department shall fund the department's participation in the Energy Commission's site certification process as the state's trustee for natural resources. The permit application fee shall be in addition to any application fees collected directly by the Energy Commission. The permit application fee shall be due and payable within 30 days of the operative date of this section.

(d) Permit application fees paid pursuant to this chapter shall be deposited in the Fish and Game Preservation Fund and shall be eligible for expenditure by the department pursuant to subdivision (b) of Section 2081 and Section 2080.1.

(e) The sum of one million six hundred fifty thousand dollars (\$1,650,000) is hereby appropriated to the department from the Fish and Game Preservation Fund for the purposes of this section. These funds shall be available for expenditure through June 30, 2011.

(f) If an owner or developer withdraws a project within 30 days after paying the permit application fee, the department shall refund any unused portion of the fee to the owner or developer.

SEC. 4. Section 11430.70 of the Government Code is amended to read:

11430.70. (a) Subject to subdivisions (b) and (c), the provisions of this article governing ex parte communications to the presiding officer also govern ex parte communications in an adjudicative proceeding to the agency head or other person or body to which the power to hear or decide in the proceeding is delegated.

(b) An ex parte communication to the agency head or other person or body to which the power to hear or decide in the proceeding is delegated is permissible in an individualized ratemaking proceeding if the content of the communication is disclosed on the record and all parties are given an opportunity to address it in the manner provided in Section 11430.50.

(c) An ex parte communication to the agency head or other person or body to which the power to hear or decide in the proceeding is delegated is permissible in an individualized determination of an application for site certification pursuant to Chapter 6 (commencing with Section 25500) of Division 15 of the Public Resources Code, that is before the State Energy Resources Conservation and Development Commission, if the communication is made by an employee of another state agency and is made for

the purpose of enabling the presiding officer to effectively manage the proceeding.

SEC. 5. Section 25524 is added to the Public Resources Code, to read:

25524. (a) “Qualified applicant” means an applicant for certification of a solar thermal powerplant that meets each of the following requirements:

(1) The commission has determined that the application for certification was completed by February 1, 2010.

(2) The solar thermal powerplant is proposed to be constructed in the planning area for the Desert Renewable Energy Conservation Plan, as defined in Section 2069 of the Fish and Game Code.

(3) The developer or owner of the proposed solar thermal powerplant has applied for, and would qualify for funding under the federal American Recovery and Reinvestment Act of 2009 (Public Law 111-5). For purposes of this paragraph, “funding” includes a loan guarantee made pursuant to Section 406 of the act (42 U.S.C. Sec. 16516) or a grant for specified energy property in lieu of a tax credit provided pursuant to Section 1603 of Division B of the act, which division is titled the American Recovery and Reinvestment Tax Act of 2009.

(b) The commission shall establish a process to allow a qualified applicant to elect to pay additional fees to be used by the commission to contract with a third party, or more than one third party, to assist commission staff in performing the analysis otherwise performed by commission staff in determining whether or not to issue a certification. The commission shall retain discretion as to when this option will be offered to a qualified applicant.

(c) The amount of the fees charged by the commission pursuant to this section shall be conditioned upon the qualified applicant agreeing to that amount and electing to proceed with the retention of the third party or parties pursuant to subdivision (b).

(d) All fees paid by a qualified applicant shall be used exclusively for analysis of that applicant’s application for certification.

SEC. 6. (a) The Legislature finds and declares that the purpose of this section is to approve recruitment and retention differentials for specified employees in State Bargaining Units 1 and 10 that require the expenditure of funds, consistent with the state

employer's memoranda of understanding with those bargaining units and the Joint Legislative Budget Committee's determination that those differentials require legislative approval.

(b) The recruitment and retention differentials specified in subdivision (c) that are consistent with the memoranda of understanding with State Bargaining Units 1 and 10 that require the expenditure of funds are hereby approved for the purposes of Section 3517.63 of the Government Code.

(c) The recruitment and retention differentials for certain members of State Bargaining Units 1 and 10 employed at the State Energy Resources Conservation and Development Commission that were described in the attachment to the letter, dated October 29, 2009, from the Director of the Department of Personnel Administration to the Chairperson of the Joint Legislative Budget Committee shall be approved.

(d) The recruitment and retention differentials approved by subdivisions (b) and (c) and that require the expenditure of funds shall not take effect unless funds for these provisions are specifically appropriated by the Legislature or already exist within available appropriations. If the Legislature does not approve or fully fund any addendum included in this section, either party may reopen negotiations on all or part of the addendum.

(e) This section shall remain in effect only until January 1, 2011, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2011, deletes or extends that date.

SEC. 7. This act addresses the fiscal emergency declared by the Governor by proclamation on January 8, 2010, pursuant to subdivision (f) of Section 10 of Article IV of the California Constitution.

SEC. 8. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to enable certain solar powerplant owners and developers to remain eligible for funding pursuant to the federal American Recovery and Reinvestment Act of 2009, it is necessary that this act take effect immediately.

Approved _____, 2010

Governor